

Before the

**SUBCOMMITTEE ON ECONOMIC SECURITY, INFRASTRUCTURE
PROTECTION AND CYBERSECURITY
OF THE
COMMITTEE ON HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES**

Statement of

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Representing

THE AMERICAN TRUCKING ASSOCIATIONS, INC.

On

Reforming HAZMAT Trucking Security

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Driving Trucking's Success

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Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify today on behalf of American Trucking Associations, Inc. (“ATA”) on the subject of hazmat trucking security. My name is Steve Russell. I am Chairman and CEO of Celadon Group, Inc., headquartered in Indianapolis, Indiana, a truckload carrier with approximately 2,700 power units, 7,200 trailers and 2,400 employee-drivers and independent contractors operating nationwide. My company has won the Truckload Carriers Association’s National Fleet Safety Award for large trucking fleets in 2002 and 2004 (the most recent prize to be awarded). I am here on behalf of ATA, a federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA’s membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.

Overview:

According to the U.S. Department of Transportation, there are over 800,000 shipments of hazardous materials (“hazmat”) by truck every day. The 1997 Vehicle Inventory and Use Survey found that 8.2 percent of the nation’s licensed or registered large trucks transported hazmat at some point during the year. Finally, the 2002 Commodity Flow Survey estimated that hazmat accounted for 14.8 percent of all tons transported by trucks. Despite this, trucks transporting hazmat account for just roughly 4 percent of large truck crashes. Additionally, to date, no truck belonging to a registered carrier and transporting hazmat has been used in a terrorist attack in the United States.

From the above, it is clear that the trucking industry has safely and securely transported hazmat for decades. In the midst of today’s heightened security environment, the trucking industry continues to play its part in ensuring the secure transportation of all goods, including hazmat. However, the trucking industry has borne the brunt of government-imposed hazmat transportation security programs that are over-reaching and are not properly aligned with the primary objective of preventing a terrorist from using a large truck hauling hazmat to do catastrophic harm.

In this testimony, I will focus on the security threat assessment requirement for hazmat-endorsed drivers that was enacted by Congress in October 2001 as part of the USA PATRIOT Act (hereinafter “the hazmat background check”) and further implemented by the Transportation Security Administration (“TSA”) as a glaring example of government’s failure to adopt a risk-based approach to security regulation. Yet the lessons learned from the hazmat background check program and the need for a risk-based approach apply equally to current and future regulations concerning the security of hazmat transportation. The hazmat background check, although just recently fully implemented, is hurting trucking companies and their drivers. Drivers are incurring the higher than necessary costs associated with the hazmat background check and bearing the costs associated with taking a day(s) off work to submit fingerprints at approved locations. Companies are beginning to see their numbers of hazmat-endorsed drivers go down, which diminishes their ability to haul hazmat. As set forth further in this testimony, these negative impacts can be avoided while still preserving the security objective.

A misconception of what constitutes hazmat seems to be at the heart of the problem. A number of everyday commodities such as paint, perfume, nail polish, soft drink syrup, batteries, and matches are considered hazmat and require placarding – and thus a hazmat endorsement to the commercial driver’s license (“CDL”) to transport them by truck – when transported in certain threshold quantities. These products do not represent any more of a threat to our homeland than carrying a truckload of bread. They cannot be used as weapons of mass destruction and are unlikely to be attractive to terrorists. Nevertheless, a driver seeking to transport these products must now undergo an expensive, time-consuming fingerprint-based background check. As presently administered, the background check would apply to the 2.7 million hazmat endorsement holders – well over two-thirds of the estimated active over-the-road truck drivers.

The trucking industry has long been actively engaged in promoting security. It is in our interest from both a customer relations perspective and a financial bottom line perspective. At my company, even though it is not required, we do criminal history record checks on our drivers using third party services that available records from pertinent jurisdictions. However, the imposition of burdensome and costly programs governing the transportation of hazmat, such as the hazmat background check program, threatens to erode the industry’s ability to continue to deliver the goods that the consumer expects. I urge this Congress to approach homeland security from a true risk-based viewpoint in order to ensure that our Nation’s commerce may flow as freely as possible.

A. The hazmat background check program has been marred by a number of bad decisions.

1. The hazmat background check program should not have been linked to the CDL/hazmat endorsement.

Congress was rightly concerned about the security of transportation of certain hazmat. Admittedly, some hazmat could be readily used to cause widespread harm; however an overwhelming majority of the hazmat transported does not pose a significant security risk. By tying the security program to the issuance, transfer or renewal of the hazmat endorsement to the CDL, Congress greatly overshot the mark. As a result, drivers who haul ordinary freight and hazmat that cannot be used as a weapon must expend significant monies and time to submit fingerprints for a check against databases that are equally searchable using names and other unique identifying information. As discussed further in section B.2 of this testimony, Congress has previously identified a list of hazmat deserving of special consideration. In my business, we look at every activity we engage in to determine whether it is cost-effective. It does not seem that securing the transportation of hazmat that can do no real harm provides benefits remotely commensurate with the costs it imposes on drivers and/or carriers.

Materials that have been designated as hazmat by the Secretary of Transportation have been so designated due to characteristics that require special consideration while handling or during clean-up in the event of an accidental release. Some of these materials are hazardous only when ingested or touched, others are hazardous to the environment or are ignitable but would not be attractive to a terrorist as a weapon. In a similar vein, the CDL has always been utilized to indicate a driver’s qualification to *safely* drive a commercial motor vehicle and, with respect to

the hazmat endorsement, as a measure of the driver's knowledge of the hazmat regulations to *safely* transport placarded quantities of hazmat.

The PATRIOT Act background check mandate focused solely on security, with the objective of preventing a terrorist from using a truck loaded with hazmat to do harm. That security objective is vastly different from the safety objective underlying the hazmat regulations and the hazmat endorsement. Trying to fit a square peg into a round hole is an apt analogy for TSA's attempt to take a safety-based system and try to transform it into a security-based system without modification. The safety-based hazmat universe is simply too broad to serve as the foundation for a program to regulate transportation security.

2. By requiring a fingerprint-based check for all hazmat-endorsed drivers and implementing the program in the manner that TSA has, the costs to drivers and carriers are unacceptably high and serve as a disincentive to obtaining a hazmat endorsement.

TSA designed the hazmat background check program to be fingerprint-based, although the terrorist databases and watch lists are populated with names only and the criminal history records databases can be searched using names (as evidenced by the National Instant Criminal Background Check System ("NICS") utilized to check the criminal backgrounds of gun purchasers). This requirement has added significant costs: both direct costs in terms of fees charged to offset the costs of collecting and processing fingerprints and indirect costs in terms of driver time off work. These costs and the added inconvenience to drivers – not the prospect of being found to be a terrorist – are dissuading more and more drivers from obtaining hazmat endorsements.

Briefly, the fees charged for the hazmat background check program vary depending on whether or not the driver is in a state that opted to use the TSA contractor for fingerprint collection. In those states that opted to use the TSA contractor, the fee is \$94 broken down as follows: \$38 for the Information Collection fee (i.e., fingerprint capture); \$22 for the FBI fee; and \$34 for the Threat Assessment fee. The 17 states that opted to collect prints on their own must charge \$24 for the FBI fee and \$34 for the Threat Assessment fee but are free to charge what they desire for fingerprint collection. In New York, this fee is \$75 for a total security threat assessment fee of \$133. Drivers are required to go through the fingerprinting process at least once every five years, thus these fees are recurring. The fees charged to truckers does not compare favorably to: 1) an airport worker with unescorted access to secure areas who pays \$29 or \$31 (which includes the \$22 FBI fee) for his/her check, depending on collection method; 2) the proposed fee for checks of workers with unescorted access to air cargo, which is \$39; or 3) a driver participating in the Free and Secure Trade border-crossing program who pays \$50 for his/her check and receives a credential with an RFID for that price. ATA finds it particularly appalling that TSA has made clear the trucking industry is paying these significantly higher fees to subsidize the establishment of a screening system that will be used for screening of other transportation workers in the future, but at significantly lower costs to them.¹

¹ In TSA's Air Cargo Rule, which would broaden the background check requirements for certain aviation workers to include screeners and supervisors of screeners of cargo to be carried aboard all-cargo aircraft and which TSA proposed on the same day that it proposed the fees for the hazardous materials background check program, TSA stated:

These higher than necessary fees are, unfortunately, just one part of the problem. The other significant issue with the hazmat background check program is the location and operating hours of the approved fingerprint collection sites. Many drivers have to take significant periods of time off work – most often without pay - to submit their fingerprints. For example, a driver based in Montana who works for a large carrier with operations nationwide had to travel 150 miles one way from Great Falls to Butte in order to submit prints at the TSA-approved location. As if that was not bad enough, that same driver had to make the round-trip again when he was notified that the collection agent had failed to capture the fingerprints properly. In a state like Montana, it is roughly 270 miles one-way to go from Eastern Montana (where a lot of oil activity takes place and where hazmat endorsements are necessary) to Billings (the closest approved collection site). At Celadon, my drivers tell me they have to make a minimum of two visits and in some locations three visits, in order to complete the hazmat endorsement process. Assuming my drivers make roughly \$200 per day, you can begin to calculate what the costs are to them. Add to that my costs as a company due to having a driver miss a day of work at a time when I am looking for additional drivers. Drivers also complain about the hours of operation of the approved fingerprint collection sites. Many locations are only open two days per week for only four hours per day.

It is easy to see why drivers are discouraged. The repercussions are just now starting to be felt and portend to be significant. For many carriers, hazmat represents roughly 5 percent of their overall freight. However, for scheduling and efficiency reasons, many carriers used to require all their drivers to maintain hazmat endorsements so they could haul any load. This allowed carriers to dispatch the closest driver to pick up a load, whether it was a hazmat placarded load or a load of ordinary freight. As a result of the cost and inconvenience associated with the hazmat background check program, many carriers are no longer requiring their drivers to maintain hazmat endorsements. We at Celadon are one of those companies. Hazmat such as lubricants, soft drink syrup, and nail polish represents 1.5 – 2 percent of our total freight, yet, until recently, we required all 2,400 of our U.S.-based drivers to have a hazmat endorsement. Now we face the likelihood of increased costs associated with sending hazmat-endorsed drivers greater distances to pick up a hazmat load even though we may have other drivers closer to that load. Carriers, like my company, are seeing, or expect to see, fewer drivers obtaining or renewing their hazmat endorsements and several carriers expect to be out of the business of hauling hazmat altogether

[W]here possible, TSA would leverage existing processes, infrastructure and personnel that are envisioned to be in place for other Security Threat Assessment programs at the time this program begins operation. Existing infrastructure that would be leveraged include the HAZMAT Endorsement Program's Hazardous Materials Endorsement Screening Gateway System (HMESG); however, some modifications to these systems would be necessary to meet the proposed requirements. The changes would include connectivity with additional government agencies, software enhancement and additional backup capabilities.

TSA then estimated that total start up costs for the above air cargo system would be \$690,000, compared to total start up costs of \$4,760,000 for the HMESG, a differential of more than \$4 million. ATA supports the concept of government agencies leveraging resources to implement the requirements for security threat assessments more efficiently. In fact, the coordinated, nationwide, transportation-wide system that ATA could support would do just that. In this instance, however, it is unconscionable to require the trucking industry to bear the burden of what amounts to a subsidy for other transportation sector workers.

in the future. By TSA's own estimate, the hazmat background check program will result in a loss of 20 percent of the hazmat-endorsed driver population. ATA has submitted for the record a letter signed by 39 motor carriers of various sizes and operations who have expressed concern about their continued ability to haul hazmat in the future as a result of the costs and burdens imposed by the hazmat background check program. The program needs immediate attention.

3. *TSA's failure to implement a uniform, nationwide system has led to uneven implementation by the states, which poses problems that disrupt a carrier's operations.*

The lack of uniformity in the administration of the hazmat background check program has caused problems for drivers that have sought to transfer a valid hazmat endorsement between states. This issue was brought to ATA's attention by carriers with drivers in South Carolina, New York and Illinois. Drivers that were legally authorized to transport hazmat nationwide one day were being stripped of their endorsements (and in many cases, thus unable to drive for their employers) by these states. Since this was not the agency's intent, TSA tried to correct the problem by issuing guidance to the states on the spirit of the regulations. However, the problem is that it was just that – guidance – and did not have any obligatory force or effect.

Notwithstanding the fact that TSA issued a permissive exemption to states from the prohibition against issuing a transfer hazmat endorsement prior to receiving a Determination of No Security Threat Assessment, Illinois continues to revoke hazmat endorsements issued by other states upon submission of a transfer application. This means that a driver holding a valid hazmat endorsement that moves into Illinois must surrender his/her hazmat endorsement and await completion of the security threat assessment process. In this circumstance, the affected driver, through no fault of his/her own, may be unable to earn a living -- for several weeks -- until TSA issues a Determination of No Security Threat and Illinois reissues a CDL with a hazmat endorsement.

B. A new approach could provide the same level of security for transportation of hazmat by truck without the same overwhelming costs.

As previously stated, the trucking industry supports common-sense, effective measures to secure the transportation of hazmat by truck. With respect to the hazmat background check program, ATA believes there are two alternative approaches which would continue to achieve the security objective while reducing the negative impact on the trucking industry's ability to move the Nation's goods. It is up to this Congress to provide the leadership and direction to fix a program that is fundamentally broken.

1. *According to TSA's past statements, name-based checks could achieve the primary security objective.*

As demonstrated above, the primary cause of the exorbitant costs and inconvenience associated with the hazmat background check program – and thus driver and carrier dissatisfaction with the program – is the submission of fingerprints. Congress did not explicitly require fingerprints in the PATRIOT Act. ATA believes the primary objective of the hazmat background check problem is and should be to reduce the likelihood of a terrorist gaining authorized access to

hazmat with the potential to do harm. In light of this reasonable objective, ATA is convinced by TSA's past statements that name-based checks are effective.

In the April 6, 2004 Federal Register, TSA stated, with respect to checking terrorist-related databases in advance of fingerprint-based criminal history record checks, "TSA believes that this name-based check of all drivers who are currently authorized to transport hazmat will enable the agency to focus on individuals who may pose a more immediate threat of terrorist or other dangerous activity." TSA further stated, "The terrorist-related information that TSA will search prior to January 2005, is the best indication of an individual's predisposition to commit or conspire to commit terrorist attacks." Later, in a November 10, 2004 Docket Exemption Notice, TSA stated, "Moreover, TSA has completed a name-based threat assessment of all current HME holders and repeats this check periodically. TSA has disqualified the individuals TSA has concluded pose or may pose a security threat. Therefore, TSA has determined that delaying [fingerprint-based checks] for individuals who currently hold an HME and must renew or transfer them within the next several months will not adversely impact security."

In its Air Cargo Rule, TSA proposed to require individuals who have unescorted access to air cargo but had not undergone the background check required for Secure Identification Display Areas ("SIDA") access (i.e., secure areas of an airport) "to undergo a security threat assessment to verify that they do not pose a security threat."² In that rule, TSA proposed that such individuals should only be subjected to a name-based background check. Part of its rationale included:

TSA recognizes that the number of individuals with access to cargo is large—approximately 63,000—and that the companies they work for run the gamut from complex organizations to "mom and pops." Therefore, requiring all these individuals to undergo fingerprint-based criminal history background checks would be a time-consuming and costly process. TSA believes that potential security concerns related to unescorted access to cargo by these individuals would be best addressed by requiring individuals to submit to a Security Threat Assessment program, focused on the threat of terrorism. A Security Threat Assessment, as proposed in this NPRM, would rely on checks of existing intelligence-based records and databases to ensure that an individual who is a known or suspected threat is prohibited from working in positions that could allow that individual to have unescorted access to air cargo. This program adopts best practices from the financial services and transportation security communities to reduce the likelihood that a terrorist could gain access to cargo.³

Applying that rationale to the trucking industry, how TSA ended up with the process that the trucking industry now faces is inexplicable. The affected trucking industry population is large—approximately 2.7 million by TSA's numbers, which is approximately 45 times larger than the air cargo population TSA considered—and trucking companies certainly run the gamut from complex organizations to "mom and pops." Experience has certainly shown that the fingerprint-based records check process designed by TSA is both time-consuming and costly. And in the end, a hazmat endorsement essentially allows an individual unescorted access to cargo. Consistent rationale points to the conclusion that name-based checks should suffice.

² 69 Fed. Reg. at 65265.

³ 69 Fed. Reg. at 65265.

ATA understands that Congress also directed a search of criminal history record databases. As discussed earlier, this is already being done in other contexts using names and other unique identifiers. Name-based checks are conducted every day in compliance with the Brady Act for gun purchases and by Customs and Border Protection officials for customs and immigration purposes. These checks are made against the NCIC 2000 database, which contains records on wanted persons, and the Interstate Identification Index, which contains over 35 million criminal records. One is thus left with the question of whether requiring fingerprints helps further achieve the security objective to such extent that it justifies the disruption to the transportation of everyday hazmat commodities. We think not.

2. A risk-based approach that limits the background check requirement to drivers hauling hazmat that truly poses a risk of causing catastrophic harm would achieve the security objective and limit the disruption to the transportation of non-threatening hazmat.

One would surmise that the underlying rationale for screening a person before giving them access to hazmat would be that hazmat could readily be used to do significant harm. However, that is not the case for a wide variety of hazmat currently covered under the hazmat background check program. For example, we are well aware that certain explosives could be used to take down a building; however, placarded explosives also include a large shipment of airbag components or emergency flares, which are not weaponizable and pose no significant security risk. Similarly, the transportation of a tanker full of liquefied natural gas may pose security concerns that are not present in the transportation of 5 drums of paint. Since many companies – and drivers – never haul any hazmat that could readily be used as a weapon, it seems that the trucking industry is being directed to expend significant resources protecting the public against a potential harm that does not exist. A more appropriate, risk-based approach would focus on hazmat that truly pose a threat of significant harm to the public.

It would be disingenuous for ATA to take sole credit for proposing to narrow the list of hazmat that require special attention. As mentioned earlier, Congress set the framework for such a list. In 2004, the Federal Motor Carrier Safety Administration (“FMCSA”) promulgated regulations requiring carriers that haul certain hazmat in certain threshold quantities – not all hazmat requiring placarding - to obtain a federal hazmat permit. The regulations require a permit for the materials listed below if transported at or above the indicated quantities:

- *Radioactive Materials*--A highway route-controlled quantity of Class 7 materials.
- *Explosives*--More than 25 kg (55 pounds) of a Division 1.1, 1.2 or 1.3 material, or an amount of a Division 1.5 material requiring a placard under 49 CFR part 172, subpart F.
- *Toxic-by-Inhalation (Division 2.3 and 6.1) Materials*--Hazard Zone A materials in a packaging with a capacity greater than 1 liter (0.26 gallons); a shipment of Hazard Zone B materials in a bulk packaging (capacity greater than 450 L [119 gallons]); or a shipment of Hazard Zone C or D materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500) gallons.
- *Liquefied natural Gas* -- A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent, in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

FMCSA’s composition of this list took into consideration both safety and security concerns.

While ATA understands that the federal hazmat permit list is not exhaustive and that other materials in certain quantities should be added due to their potential to do harm, ATA also firmly believes that this list represents a solid foundation from which to launch a comprehensive review of the regulations addressing security of transportation of hazmat by truck. A narrowing of the hazmat background check program to cover only security-sensitive hazmat would provide relief for a large number of truck drivers from unnecessary burdens while adequately protecting the homeland. Moreover, developing a list of security-sensitive hazmat would also provide a rational foundation for other current and future regulation of hazmat transportation security.

In its regulatory flexibility analysis accompanying the above regulation, FMCSA estimated that there were 1.2 million shipments of the above-covered commodities per year, which means an average of 3,288 shipments daily. This represents just 0.4% of the average daily hazmat shipments. This is where the appropriate focus should be.

ATA understands that some will argue that the problems the industry complains of now with respect to drivers not getting their hazmat endorsement and thus a diminished capacity to transport hazmat will now be shifted to those materials that are deemed security-sensitive. Some fear that there will be nobody around to haul those security-sensitive materials. These arguments are based on a fundamental misunderstanding of the industry. Carriers that haul what would likely be deemed security-sensitive hazmat are specialized. They have already made a conscious decision to get into that market and deal with the potential increased liability that comes with hauling, for a lack of a better descriptor, higher-level hazmat. This type of freight often represents a significant portion of their business. These carriers will likely continue to haul these materials and require their drivers to get the appropriate clearances. However, a large majority of carriers have consciously decided not to haul these types of materials and instead haul non-threatening hazmat. These are the carriers who may get squeezed out unless Congress delivers the necessary reform.

Conclusion

Mr. Chairman and members of the Subcommittee, I thank you for the opportunity to share with you the trucking industry's concerns with the current approach to regulating the security of hazmat transportation. While hazmat is a small portion of the Nation's general freight, it is an important portion that is crucial to the manufacture of the products that contribute to our general welfare. To continue our economic prosperity, we cannot overly burden the transportation of hazmat as a whole for the sake of protecting the Nation against that significantly smaller portion of hazmat that can be attractive as a weapon to do harm. The trucking industry stands ready to work with this Congress to protect our homeland without unnecessarily burdening the movement of commerce.